THE ATTORNEY GENERAL OF TEXAS

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March 14, 1988

Honorable Ralph R. Wallace, III
Chairman
Natural and Historical Resources Committee
Texas House of Representatives
P. O. Box 2910
Austin, Texas 78769

LO-88-28

Dear Representative Wallace:

Thank you for your letter of January 25, 1988. You ask about the constitutionality of a 1988 amendment to section 143A of article 6701d, V.T.C.S., which deals with the dismissal of certain misdemeanor charges upon completion of a driving safety course. The amendment you ask about provides:

> No person shall distribute any written information for the purpose of advertising a provider of a driving safety course within 500 feet of any court having jurisdiction over an offense subject to this section. This subsection does not apply to distribution of such information to a court for the purpose of obtaining approval of the course, or to advise the court of the availability of the course, or to distribution by the court. A violation of this subsection by a provider, or the provider's agent, servant, employee, or a person acting in a representative capacity for the provider, shall result in loss of the provider's status as a provider of a course approved or licensed by the Texas Department of Public safety or other driving safety course approved by the court.

V.T.C.S. art. 6701d, §143A(e). You ask whether that prohibition violates the right to free speech.

Cases governing commercial speech under the United States Constitution set out a four-part test for determining the constitutionality of prohibitions on commercial speech. Central Hudson Gas & Electric v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). See also Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 106 S.Ct. 2968 (1986). The four tests are: (1) Is it lawful activity?; (2) Is the government interest substantial?; (3) Does regulation advance a governmental interest?; and (4) Is the regulation more extensive than is necessary to achieve the governmental interest? Resolution of those issues involves fact-finding, which we are unable to do in the opinion process.

Although we are unable to answer your question, we do agree with you that the provision raises serious questions of constitutionality. For your information, we have enclosed copies of the following three state-court opinions, each of which found a particular restriction on commercial speech to be unconstitutional: (1) Michigan Beer & Wine Wholesalers Assoc. V. Attorney General, 370 N.W.2d 328 (Mich. Ct. App. 1985)(Michigan's restrictions on advertising prices or brands of liquor held unconstitutional); (2) People v. Mobil Oil Corp, 409 N.Y.S.2d 329 (N.Y. App. Div. 1978)(New York's restrictions on advertising prices of gasoline held unconstitutional); (3) People v. Remeny, 387 N.Y.S.2d 415 (N.Y. 1976)(New York's prohibition of distribution of commercial leaflets in public places held unconstitutional); We have also enclosed a copy of The Daily Herald Co. v. Munro, No. 86-3641 (9th Cir. filed Feb 2,1988), which deals with a Washington statute that prohibits exit polling within 300 feet of a polling place. Although Daily Herald is not a commercial speech case, we think the discussion might be of interest to you.

Your remaining questions all seek general guidance about "recommended" administrative procedures in the Municipal Courts of Houston. Although the opinion committee can provide opinions regarding the legality of specific administrative procedures, we do not give general advice or make general recommendations about administrative procedure for governmental bodies.

Very truly yours,

Sarah Woelk
Assistant Attorney General
Opinion Committee

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